No. 98-5881

In The

# Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

On Writ Of Certiorari
To The Supreme Court Of Virginia

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

(CAPITAL CASE)

I. Whether the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, offered under a state exception to the hearsay rule as a declaration against penal interest of an unavailable witness when the alleged accomplice refused to testify under the Fifth Amendment, violates the Sixth and Fourteenth Amendments?

II. Whether there is a firmly rooted exception to the hearsay rule which would permit the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, without violating the Sixth and Fourteenth Amendments?

III. Whether, in assessing the reliability of the hearsay statements of an unavailable declarant, contained in a custodial confession and offered as a declaration against penal interest, the Sixth and Fourteenth Amendments prescribe that only the circumstances surrounding the making of the statements are relevant and prohibit consideration of other corroborating evidence introduced at trial, and if so, whether a custodial confession which inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, bears the requisite particularized guarantees of trustworthiness for their admission as evidence against Petitioner under the Sixth and Fourteenth Amendments?

## PARTIES

All of the parties to the proceedings below are listed in the caption of the case, *supra*. *See* Sup. Ct. R. 24.1(b).



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## BRIEF FOR PETITIONER

Benjamin Lee Lilly (hereafter "Petitioner" or "Ben Lilly") respectfully requests that the judgment of the Supreme Court of Virginia affirming his conviction and sentence of death be reversed and this matter remanded for a new trial.

## OPINIONS BELOW

The opinion of the Supreme Court of Virginia is officially reported at 255 Va. 558, 499 S.E.2d 522 (1998). JA 576. The rulings of the Circuit Court of Montgomery County (the trial court), which the Supreme Court of Virginia affirmed, were not reported. JA 17-18.

## JURISDICTION

This petition seeks review of the final judgment of the Virginia Supreme Court in this matter, entered April 17, 1998, as to which a motion for rehearing was denied on June 5, 1998. JA 614. A Petition for a Writ of Certiorari was timely filed on September 2, 1998, and this Court granted a writ of certiorari on November 9, 1998. JA 616. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The texts of the Sixth and Fourteenth Amendments to the United States Constitution (the "Constitution") are reprinted in full in an appendix to this brief.

## SUMMARY OF THE ARGUMENT

I. The admission of Mark Lilly's custodial hearsay statements incriminating Petitioner violated Petitioner's right to confrontation under the Sixth and Fourteenth Amendments. The Sixth Amendment was designed to prevent convictions based on, among other things, the admission of a non-testifying accomplice's uncross-examined testimony. Because in such circumstances the accomplice remains unknown to the jury and unchallengeable by the accused, admission of his

confession undermines the fundamental values promoted by confrontation: fairness and reliability. Under this Court's Sixth Amendment jurisprudence, the government must first demonstrate the hearsay declarant's unavailability, and then establish that the proffered hearsay bears adequate indicia of reliability. *Idaho v. Wright*, 497 U.S. 805, 814-15 (1990). Reliability may be inferred where the evidence falls within a firmly rooted hearsay exception. *Id.* If the evidence does not fall within such an exception, it must be excluded unless it bears particularized guarantees of trustworthiness. *Id.* The Commonwealth in this case fell far short of meeting its burden in numerous respects.

IA. This Court has consistently held that the custodial confession of a non-testifying and unavailable accomplice implicating a criminal defendant is presumptively unreliable "due to his strong motivation to implicate the defendant and to exonerate himself." *See, e.g., Lee v. Illinois*, 476 U.S. 530, 541 (1986). In fact, this Court has never found that presumption rebutted and has never permitted the admission of such a confession at a defendant's trial. *See id.* Following this fundamental principle that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another," *id.* at 545, this Court, the federal appeals courts and state courts of last resort consistently have concluded that such statements are presumptively unreliable and inadmissible under the Confrontation Clause, especially when the statements minimize the declarant's role in the criminal activity and shift blame onto others.

IB. The custodial statements of a non-testifying accomplice inculpating a criminal defendant do not fall within a firmly rooted hearsay exception. Without formally deciding whether the general category of statements against penal interest falls within a firmly rooted hearsay exception, this Court has concluded that it is too large a class for meaningful Confrontation Clause analysis. *See Lee*, 476 U.S. at 544 n.5. Accordingly, whether or not statements against penal interest



constitute a firmly rooted hearsay exception, as the overwhelming majority of lower courts have concluded, the custodial confession of a non-testifying accomplice incriminating a defendant does not fall within a firmly rooted hearsay exception.

IC1. This Court has made clear that in assessing the reliability of hearsay statements of an unavailable declarant which do not fall within a firmly rooted hearsay exception, only the circumstances surrounding the making of the statement are to be considered. *Wright*, 497 U.S. at 822. This Court's holding in *Wright*, which involved a child victim's statements of abuse offered under a state's residual hearsay exception, applies equally in the context of declarations against interest. Here, as in *Wright*, admission of presumptively unreliable evidence must not be permitted by bootstrapping on the trustworthiness of other evidence at trial. *See id.* at 823. Indeed, in the circumstances presented here – a custodial confession of an accomplice which shifts blame to the defendant – there can be no such showing of trustworthiness.

IC2. The circumstances surrounding the making of Mark Lilly's custodial confessions incriminating Petitioner belie any guarantees of trustworthiness. Mark Lilly's statements were made following his arrest, while he was in custody and in response to police questioning after he was told that the court would be informed of his cooperation. Those circumstances provided Mark Lilly a strong incentive to shift or spread blame, curry favor, or divert attention to another. Moreover, throughout the statements, Mark Lilly consistently relied on his drunkenness as a mitigating circumstance and minimized his role in the robberies and the murder and shifted blame to others. As this Court and every federal appeals court and state court of last resort (other than the Virginia Supreme Court) confronting statements made under similar circumstances has concluded, Mark Lilly's statements incriminating Petitioner were made under circumstances that render them inherently and inevitably suspect and hence inadmissible under the Confrontation Clause.

## STATEMENT OF THE CASE

On December 5, 1995, Alexander V. DeFilippis ("DeFilippis") was abducted and subsequently murdered. This occurred after three individuals – Gary Wayne Barker ("Barker"), Petitioner and his brother Mark Lilly – had been on a twenty-four-hour binge; all three had drunk heavily and Mark Lilly and Barker had smoked marijuana as well. JA 102, 107-09, 114, 173, 181-82, 205, 246-47, 299-301. On December 4, 1995, the three men broke into the home of a friend of Barker and Mark Lilly, stole three weapons – a rifle, a shotgun and a pistol – a safe and a quantity of liquor. JA 102-05, 248-51, 301-03. The three then visited a friend, Warren Nolen, and his girlfriend, Patricia Quesenberry. JA 106-07, 171-72, 213; Tr. Oct. 21, 1996, at 162-70, 175-179; Tr. Oct. 23, 1996, at 898-906. The three drank from the liquor they had stolen, and Barker and Mark Lilly smoked marijuana. JA 107, 181-82. Mark Lilly and Barker also attempted to sell the stolen firearms to purchase more marijuana. JA 107. Concerned by Mark Lilly's and Barker's behavior, particularly a statement by Barker that he would shoot the police if they attempted to arrest him, Nolen and Quesenberry asked them to leave. JA 343-44, 345. The three then drove to A.J. Fall's trailer, where Barker and Mark Lilly rented a room, JA 173, 333, 341, and continued to drink "all night." JA 108-09, 173, 299, 304.

The next day, December 5, 1995, the three men left the trailer, drinking and driving around the countryside. JA 109-10. That afternoon, Barker and Mark Lilly visited Mike Lang to see if he would join them, but his mother, Joyce Lang, refused to allow him to do so after Barker said that he could kill his best friend and not feel any remorse. JA 342; Tr. Oct. 24, 1996, at 917-19, 931, 1019-20. Petitioner, Mark Lilly and Barker later stopped to fire the stolen firearms at some geese – Barker firing the rifle and Mark Lilly and Petitioner shooting the pistol – and killed a goose which they put into the trunk of the car they were driving. JA 110-12. They then drove back to the trailer park, where Mark Lilly and Barker unsuccessfully attempted to trade the pistol for marijuana. JA



113-14, 174, 204-05. Thereafter, they drove to a bar, where Mark Lilly attempted to sell the pistol to Ron Lucas, a co-worker he had run into, and Barker attempted to sell the rifle. JA 114-15, 176-77; Tr. Oct. 21, 1996, at 189-92. On seeing that Barker had the weapons out, Petitioner told him to put them away. JA 55.

In the early evening of December 5, 1995, the car the three had been using broke down near a convenience store. JA 117-18, 252-53, 304. DeFilippis happened to be standing outside his car near the store. JA 120. At approximately seven o'clock, DeFilippis was ordered into the car and driven to a secluded area. Tr. Oct. 21, 1996, at 84; JA 121-23, 253-54, 304-10. DeFilippis was told to leave the car and strip down, and then shot with the pistol and killed. JA 123-29, 252-62, 309-15. Following the shooting, at approximately seven-thirty, Barker, Mark Lilly and Petitioner robbed a convenience store. JA 133-37, 262-66, 317-19; Tr. Oct. 21, 1996, at 222. They attempted to rob a second convenience store about forty-five minutes later. JA 139-42, 266-70. At the first store, Barker brandished the pistol used to kill DeFilippis and threatened Howard Barnett, the store owner, by pointing the pistol at him and ordering him to lie down and not to look at Barker's face. JA 341-42, 345-46. At the second store, Barker threatened Bill Williams, the store owner, by putting the pistol to his head, with the hammer cocked back, and saying, "I'll blow your head off." JA 350-51, 353-54.

Driving away from the second store, their car broke down, and police arrived on the scene shortly thereafter. JA 140-42, 270; Tr. Oct. 21, 1996, at 225, 264. Petitioner did not flee, but remained in the car. Mark Lilly and Barker fled on seeing the police approaching. JA 142-43, 270-71. The police arrested Petitioner on the spot, but held him at the scene for approximately two hours. *See* Tr. Oct. 21, 1996, at 240-41, 268; Tr. Sept. 25, 1996, at 159-61. They arrested Barker, who had fallen in a ditch some fifty feet away from the car, Tr. Oct. 22, 1996, at 435-37, approximately ten to thirty minutes after Petitioner was arrested and immediately transported Barker to the police station. Tr. Oct. 21, 1996, at 240-41. The police later arrested Mark Lilly and transported him to the

station. Tr. Oct. 22, 1996, at 446-48. The police first interrogated Barker beginning at 9:47 on the evening of December 5, 1995. JA 278; Tr. Oct. 23, 1996, at 808-09. Having obtained a statement from Barker, the police then interrogated Mark Lilly at 1:35 the morning of December 6, 1995. JA 244. The officer conducting the interrogation informed Mark Lilly *before* it officially began that Barker and Petitioner had said he did not commit the murder. JA 257.[1] The police interrogated Mark Lilly again at 2:30 a.m., JA 298, and finally questioned Petitioner at 3:55 a.m. JA 63.

Petitioner faced charges in Montgomery County for the abduction and robbery of DeFilippis; carjacking; and murder as part of the commission of the armed robbery of DeFilippis, which constitutes capital murder, Va. Code § 18.2-31(4); as well as the unlawful possession of a firearm and the use of a firearm in the foregoing offenses. JA 20-28. By the time of trial, Barker had received a plea bargain on essentially the same charges Petitioner faced – with the crucial difference that Barker was charged with and pled guilty to being a principal in the second degree to capital murder (*i.e.*, aiding and abetting), JA 412, which made him ineligible for the

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[1] As the officer himself stated, "I simply told you *before we started* that they said you didn't do it." JA 257 (emphasis added). Although the officer told Mark Lilly "they" said he did not do it, his testimony at trial makes clear that only Barker had been questioned by this point and that the officer would have told Mark Lilly that he had spoken with Barker. JA 278. What else the officer told Mark Lilly before the interrogation officially began is unknown; however, during the interrogation, either out of a sense of paranoia or possibly based on what he had been told by the officer, Mark Lilly responded to a question about what had happened, stating, "Nothing that you don't already know, man." JA 256. Therefore, it is clear that the transcript does not include the discussion between the officer and Mark Lilly that immediately preceded the interrogation and may have induced him to agree to an interrogation – something which he had initially refused to do. *See* JA 245 ("Mark I brought you in the interview room about ten minutes ago and advised you I'd like to ask you some questions. . . . And you initially said that you felt like you were still under the influence. . . . [Y]ou tell me now that. . . . you don't feel too drunk to talk to me.").



death penalty[2] – and had received the minimum sentence, fifty-three years, which gave him what the Commonwealth had promised, "[a] chance of maybe one day of getting out." JA 99. Mark Lilly also faced prosecution for essentially the same crimes as Petitioner, with the exception that Mark Lilly was accused of first-degree, and *not capital*, murder. Mark Lilly had not been brought to trial at the time of Petitioner's trial. As a result, the prosecution had "the option of charging Mark Lilly as the trigger man if he change[d] his story during his brother's trial and trie[d] to take the blame."[3] His charges still outstanding, Mark Lilly refused to testify at Petitioner's trial, invoking his Fifth Amendment rights. JA 238. After Petitioner's trial, Mark Lilly pled guilty to first-degree murder and received a sentence of forty-nine years.

Petitioner's five-day trial began on October 21, 1996. In his opening argument, the prosecutor predicted that the case would come down to whether Ben Lilly or Barker was lying; he failed to mention Mark Lilly, let alone ascribe to him any role in the trial. Tr. Oct. 21, 1996, at 1476. Despite that singular reliance in opening, the Commonwealth's principal evidence consisted of the testimony of Barker ***and*** custodial statements by Mark Lilly, all of which were critical to the Commonwealth's case. After Barker testified and was cross-examined, the prosecutor sought to admit all of Mark Lilly's custodial statements. The trial court admitted these statements over Petitioner's objection based on his Sixth Amendment right to confrontation. JA 7-8, 225-36.

Mark Lilly's statements principally were self-exculpatory. Although he minimally and peripherally inculpated himself in lesser crimes, his statements placed the blame for the capital crime on Petitioner and responsibility for the remaining crimes on Petitioner and Barker. Absent Mark Lilly's custodial statements, which were materially inconsistent with other evidence introduced at trial, there was scant credible

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[2] *See Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986).

[3] Lisa K. Garcia, *Slaying Suspect's Trial Starts Today*, The Roanoke Times, Oct. 15, 1996, at A2 (submitted by Petitioner during voir dire).

evidence of capital murder against Petitioner. There was no physical evidence linking Petitioner to the murder: he was not found in possession of the murder weapon, nor were his fingerprints found on it, nor was there any other physical evidence linking him to the murder. And as to Barker's testimony "fingering" Petitioner, other witnesses contradicted Barker's self-serving testimony in numerous respects.

The Commonwealth recognized by the close of trial that a successful prosecution depended on both Barker's testimony and Mark Lilly's custodial statements. The prosecutor expressly acknowledged in his closing argument that Barker was "key" to the case against Petitioner only "to a certain extent." JA 360. Indeed, Mark Lilly's uncross-examined statements were well-equipped to overcome the material failings in Barker's self-serving testimony. To cement Barker's testimony – which centered squarely on events at which only Petitioner, Barker and Mark Lilly were present, *see* JA 393 – the prosecutor repeatedly availed himself of Mark Lilly's statements to police, and used the combination of Barker and Mark Lilly to make the case against Petitioner. The prosecutor argued that both Barker and Mark Lilly admitted seeing DeFilippis, JA 362; that both Barker and Mark Lilly identified Petitioner as being responsible for his death, JA 363, underscoring in the process that Mark Lilly is Petitioner's brother, JA 363-64; that both Barker and Mark Lilly were upset by the shooting, JA 364; and that both Barker and Mark Lilly admitted firing weapons on the day of the murder. JA 396. Anticipating the defense's closing argument, moreover, the prosecutor made clear the integral role of Mark Lilly's statements: "I submit to you that there is plenty of evidence for you to [convict], and they're going to tell you you can't believe the other *two*." JA 364 (emphasis added). Finally, echoing the theme that the *two* could not be disbelieved in favor of the *one*, the prosecutor emphasized to the jury on rebuttal that it could not find that both Barker and Mark Lilly were liars and that Petitioner was innocent. JA 389-90.

On October 25, 1996, the jury, focused on the weakness of the direct evidence, requested clarification on the meaning



of circumstantial evidence, JA 401, but ultimately found Petitioner guilty on all charges. At a separate sentencing proceeding on October 28, 1996, the jury sentenced Petitioner to death for the capital murder, plus two life sentences and twenty-seven years imprisonment for the other charges. Following a post-sentencing hearing on February 11, 1997, at which Mark Lilly recanted the portions of his confession identifying Petitioner as the trigger man, JA 397-98, the trial court entered an order on March 7, 1997, sentencing Petitioner in accordance with the jury's verdicts.

**The Barker Testimony**

Beginning on October 22, 1996, and over the course of the last two days of the Commonwealth's case, Barker described the events leading up to the shooting of DeFilippis and the robberies thereafter. First, Barker described the robbery of a residence the night of December 4, 1995. He then stated that when their car broke down late the next day, Petitioner confronted DeFilippis, ordered him into the car at gunpoint, robbed him of his wallet, called Barker and Mark Lilly over to the car, drove to a secluded area and shot DeFilippis with the pistol. Barker, who testified that he found it "funny" that DeFilippis was asked to remove his clothes before he was killed, JA 127-28, 181, attempted to portray Petitioner as a cold-blooded and merciless killer. JA 128-30. Barker claimed that Petitioner said he shot DeFilippis because DeFilippis had seen his face and he did not want to return to prison. JA 129-30. Barker feebly attempted to disavow the existence of any such motive on his own part. He claimed that while he was concerned about later being identified by DeFilippis, he had managed to hide his face from DeFilippis every step along the way to the murder – as he walked up to the car when it was being hijacked, when he rode in the car with DeFilippis, and when he exited the car at the scene of the murder – but conceded on cross-examination that he could not be certain that DeFilippis had not seen his face. JA 122-23, 183-85, 208.

Barker then described the robberies of the two convenience stores following the murder, admitting that he brandished the murder weapon during both robberies, JA 129, 135-36, 139-40, 189, and that while fleeing the scene of the second robbery, he fired the rifle out the window of the car to frighten off the driver of the car in pursuit. JA 141-42. He emphatically denied threatening anyone during either robbery, however, and specifically denied ordering a victim to lie on the ground and not to look at his face. JA 177-78, 183, 188-90. Finally, he testified that he was arrested as he sat in a ditch with a rifle in his mouth and called out for the police to tell his mother that he loved her, wanting to kill himself "[f]rom what I seen and, and, and, and for what I did." JA 144-45, 194.

**The Impeachment Of Barker's Testimony**

Barker's testimony was contradicted by other witnesses, particularly with respect to statements he made evidencing his willingness to kill if necessary, as well as threats he made, while wielding the murder weapon, to victims during the convenience-store robberies.[4] Barker's testimony was also impeached as to Petitioner's behavior the night before the murder. Witnesses contradicted Barker's testimony that Petitioner handled firearms during two visits that night and Barker's denial that Petitioner ordered Barker, who was drinking and had brought the weapons out in public, to put them away.

First, Barker testified that Ben Lilly shot DeFilippis at point-blank range. JA 195. On the contrary, Dr. David Oxley, a forensic pathologist and deputy chief medical examiner for Western Virginia, testified that the victim's wounds revealed no gunshot residue, which would indicate shots fired from more than two feet away. JA 91.

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[4] Witnesses also testified regarding Barker's reputation for being untruthful. JA 356-57; *see* JA 332.



Second, although Barker admitted having failed to tell the police that they visited Warren Nolen and Patricia Quesenberry on December 4, 1995, he denied telling Nolen and Quesenberry that if the police attempted to pull his car over, he would shoot them. JA 171-72. On the contrary, Ms. Quesenberry testified that because she knew Mark Lilly and Barker "were out doing things that they shouldn't be doing," she asked, "what would they do if the law would get after them," and Barker, jumping off the couch, said, "I'll take a gun and blow out the back window and then I'd shoot anyone that would try to take [me]." JA 343-44. Mr. Nolen confirmed that Barker made a "comment about if they got stopped or anything he would shoot the back glass out, shoot a cop or anybody." JA 345.

Third, Barker denied that later on December 4, 1995, he pointed a gun at or threatened A.J. Fall, who rented a room to Mark Lilly and Barker, and denied that Mark Lilly had pulled the hammer back on the pistol or pulled it out to threaten anyone. JA 173-75. Mr. Fall testified, however, that Barker pointed a rifle at him, JA 335-36, and that later, when words were exchanged with a neighbor, Mark Lilly pulled the hammer back on the pistol he was carrying inside his sweater jacket, exposed the gun and gave the impression that he was going to pull it out. JA 337-40.

Fourth, while Barker claimed to be "positive" that Petitioner handled a weapon during the visits with Mr. Nolen, Ms. Quesenberry and Mr. Fall, JA 172, 174, Ms. Quesenberry and Mr. Fall testified that Petitioner did not handle any of the weapons. JA 329, 334-35.

Fifth, Barker denied having seen Joyce and Michael Lang on the day of the murder and denied telling them that he could kill his best friend and not regret it. JA 176. On the contrary, Mrs. Lang testified that Barker was at her house and had said "[t]hat he could kill his best friend without regretting it," and that she had therefore not wanted her son to go out with Mark Lilly and Barker. JA 342.

Sixth, when asked whether at a bar that same night, he pulled out a gun and Ben Lilly told him to put the guns away, Barker testified, "Definitely not." JA 177. To the contrary,

Ron Lucas testified that when Barker showed him a rifle at the bar, Petitioner told Barker to "put the . . . God damn guns away." JA 55.

Seventh, Barker denied having pointed a gun at Howard Barnett, one of the owners of the first store that was robbed, and further denied telling Mr. Barnett not to look at his face. JA 183, 188. Mr. Barnett and Mrs. Barnett, who was also in the store when the robbery occurred, both testified that Barker pointed a gun at Mr. Barnett, JA 341-42, 346, and Mr. Barnett testified that Barker ordered him to lie down and not to look at Barker's face. JA 341.

Finally, Barker denied saying to Bill Williams, who attempted to prevent the second convenience-store robbery, that he would blow Mr. Williams' head off, and denied pointing a gun at his forehead. JA 177-78. Mr. Williams testified, however, that Barker, after struggling with him and while holding a gun to his head, said, "I'll blow your head off," and Mr. Williams then directed the clerk to hand over "the damn money." JA 350-51. Mona Hylton, the clerk on duty at the time of the robbery, also testified that Barker pointed the gun at Williams' head, adding that Barker had pulled the hammer back on the gun. JA 353-54.

Barker's testimony was a constructed effort to avoid the death penalty and perhaps one day leave prison alive. His testimony was self-serving and he lied about his violent statements the night before the murder and his life-threatening criminal behavior immediately following the murder.

**The Mark Lilly Statements**

On October 23, 1996, just before resting its case, the Commonwealth introduced Mark Lilly's custodial statements to police to cement Barker's self-serving testimony against Petitioner. In his recorded statements to police, Mark Lilly repeatedly offered claims of mitigating circumstances and consistently shifted primary responsibility for the crimes to Barker and Petitioner. After the officer conducting the first interrogation explained that by speaking with him Mark Lilly could "at least offer the court the fact that you did own up to



it and was willing to take responsibility for what occurred," JA 247,[5] Mark Lilly explained that he, Ben Lilly and Barker had started drinking the day before, JA 247, 299-300, and had "partied all night," JA 299, that he had awoken drunk that morning and that he had been drinking liquor – "Vodka, Evan Williams, Jim Beam, a little bit of everything" – all that day. JA 248. Throughout his statements, Mark Lilly relied on his drunkenness as an excuse for his lack of memory as well as for his actions.[6]

Having thus attempted to establish his drunkenness as an excuse, Mark Lilly then proceeded to minimize his role in every aspect of the alleged crimes and consistently shift blame onto Barker and Petitioner, going so far in his attempt to distance himself from Petitioner and Barker as to claim that it was Petitioner and Barker who were friends when, in fact, it

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[5] When Mark Lilly later became concerned that he would be incarcerated for "armed robbery" and "some kind of murder charge," the officers explained, "That's why we're talking to you, we're trying to help you right now. . . . " JA 307. *See* JA 311 ("We're trying to help you. . . . ").

[6] *See* JA 248 ("What time did ya'll leave that residence this morning? I have no idea. . . . Besides, I've been drunk all day, I was drunk when I got up."); JA 249 ("So you went to a residence, you got the liquor out, and what else did you get? I don't, I don't really know, you know, everything that was got out cause I was drunk."); JA 254 ("So did all of ya'll load into the car then? I had to or get left man, I was so drunk."); JA 255 ("Anything that you remember about him? What he was wearing or anything that stood out? I don't really remember man, I was so drunk."); JA 264 ("You didn't pay for it, you just took it? Right, I was so drunk, I don't do that shit, you know, if I'm sober."); JA 267-68 ("Did ya'll discuss it before you went in, say 'Ben you stay here and we're gonna go in and rob this' or what was the discussion? We was all so drunk."); JA 299 ("If you would, let's talk about how did yesterday start off? I was drunk. . . . I was drunk. . . . Drunk as I ever been."); JA 303 ("Anything else you can think of? Not that I can think of. I was so drunk. I was drunk when you brought me in here at 1:30 this morning."); JA 304 ("What do you remember next? . . . Drunk as shit. That's all I remember."); JA 306 ("Ben told y[']all to come on? Yeah, we was drunk man."); JA 308 ("What did they, where were the rifle and shotgun at that time? I don't even know. I wasn't worried about no gun. I was drunk, the only thing I keep up with man is the beer.").

was *Mark Lilly* and Barker who were friends and roommates. JA 100, 333, 341. Indeed, if Mark Lilly's statements to police are credited, he drank significant amounts of alcohol the day before and the day of the murder and was merely present when the various crimes he described occurred; Petitioner was responsible for the carjacking, robbery and shooting of DeFilippis;[7] and Petitioner and Barker were to be blamed for the convenience store robberies following the murder. Mark Lilly's story was as follows:

First, Mark Lilly addressed the theft from the friend's residence the night before the murder, saying initially that Petitioner – "Lilly, just Ben" – stole liquor from the residence. JA 249. While he later admitted that they were "all on it," he only admitted stealing liquor, but stated that Petitioner and Barker stole "some guns or something." JA 249-50.

Second, Mark Lilly identified Petitioner as the one who pulled a gun during the carjacking, JA 253, 304-05, placing himself passively in the disabled car while the other vehicle was being carjacked. JA 305-06. When asked if he had ridden away in the carjacked vehicle, he explained that he "had to [get in the car] or get left man." JA 254. He further denied having a gun while riding in the hijacked car. JA 255.

Third, Mark Lilly stated that he had "nothing to do with the shooting," going so far as to deny even having left the car when DeFilippis was shot. JA 256, 258-59, 312-13, 319. He explained that he thought Petitioner was going to leave DeFilippis outside the car and just take the car. JA 259.

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[7] When Mark Lilly expressed a reluctance to incriminate his brother, the officer counseled:

> [N]ormally I can understand if you don't tell on family members. But when you get down to the fact that he may be dragging you right in to a life time sentence, I think it's time for family ties to be broken. *Especially if he done it without . . . consent of everybody. If ya'll had all said, "Yeah, let's all kill him" or something. I think you need to share in it.* But now, if a family member done something of this magnitude, and took it upon himself to do it, that's my opinion.

JA 257 (emphasis added).



Fourth, when asked about the robberies generally, Mark Lilly stated he did not know whose idea it was, "the robber[ies] just happened like that." JA 317-18. He later said, however, "[I]t just all happened quick. *They* was drunker than hell." JA 318 (emphasis added). When asked whether he had received any money from the robberies, he added, "A few dollars. Both of them mother-fuckers are crazy. . . . Ben and Gary. Already had enough charges on them as it was." JA 319.

Fifth, with respect to the robbery of the first convenience store, Mark Lilly said simply that "*they* wanted to rob it." JA 263 (emphasis added). He added that either Petitioner or Barker was armed, but denied carrying a weapon himself, and identified Petitioner as the one who stole the money from the store. JA 263, 265-66. In virtually his only direct inculpatory admission, Mark Lilly confessed that he stole a twelve-pack of beer from that store; however, he quickly explained that he did so only because he was drunk. JA 264.

Finally, with respect to the robbery of the second convenience store, Mark Lilly identified Barker as being armed, but denied carrying a weapon and denied they stopped to rob the store, claiming that "[w]e stopped there for something, I don't know." JA 267. He explained that Barker confronted the clerk, brandishing a gun and announcing that this was a robbery. JA 268. When asked about shots fired from the car as they made their escape, he said he did not know who fired out the window, but denied that he had done so. JA 269-70.

Accordingly, in his statements to police, Mark Lilly only halfheartedly accepted responsibility for stealing beer. However, he never admitted making even a single decision with respect to any of the crimes, other than deciding to get in the victim's car once it had been hijacked so as not to be left behind. He never admitted carrying a weapon, and never admitted even speaking to the victim. Instead, he placed virtually all responsibility for the crimes on Barker and Petitioner. Thus, virtually none of the statements were truly against Mark Lilly's penal interest. His version of events was

also contradicted in material respects by the physical evidence and the testimony of disinterested witnesses and Barker.

**The Contradictions Between Mark Lilly's Statements And The Testimony Of Disinterested Witnesses And The Physical Evidence**

The testimony of disinterested witnesses and the physical evidence contradicted Mark Lilly's statements to police on several points. First, Mark Lilly misrepresented his relationship with Barker, describing Barker as his "brother's buddy." JA 248. Mr. Fall testified, however, that Mark Lilly and Barker were renting a room together in his mobile home. JA 333, 340-41. (Indeed, Barker himself testified that he had known Mark Lilly, who was living with him, JA 100, for "a long time" but had only known Petitioner for "[a] month or so." JA 98.)

Second, Mark Lilly told police he was unaware of the location of the house that they broke into the night before the murder and did not know whose house it was. JA 248-49, 279-80, 301. To the contrary, Danny Sanders, who owned the house, testified that Mark Lilly and Barker not only knew where he lived, having been there on several occasions, but also knew he would be out of town the night of the break-in. JA 55-56.

Third, regarding his role in the convenience-store robberies, Mark Lilly stated only that he "was with the people who did [the robberies]." JA 317. He specifically denied taking any money from the stores himself. JA 264-66, 268. Louise Barnett, owner of the first store that was robbed, testified, however, that Mark Lilly was one of the parties who gathered up whatever they wanted from the store. Tr. Oct. 24, 1996, at 1070. Bill Williams, owner of the second store that was robbed, testified that while Gary Barker held a gun on him, Mark Lilly took the money out of the cash register. JA 351. Mona Hylton, the clerk at the second store, also testified that it was Mark Lilly who grabbed the money as he ran out of the store. JA 354.



Fourth, Mark Lilly said the clerk at the second convenience store was laughing at one point during the robbery, JA 268, but both Mr. Williams and Ms. Hylton denied that Ms. Hylton had laughed. JA 352, 355.

Fifth, while Mark Lilly claimed that he did not leave the car at the murder scene, JA 258-59, 312, police found a money clip stolen from Danny Sanders' home the night before the murder and seen in Mark Lilly's possession that same night, JA 54, 329-31, at the scene of the murder. JA 84-85, 86.

Finally, Mark Lilly stated that he was "broke" before the convenience store robberies, JA 318, and that after the three divided the money from the robberies, he had under a hundred dollars in his possession. JA 264-65. The police inventory of items in his possession noted, however, that he had one hundred and twenty-nine dollars in his possession, Tr. Oct. 22, 1996, at 480 – a sum which supports his later recantation in which he admitted robbing DeFilippis of twenty-one dollars. JA 397. (The police inventory showed that Petitioner had ninety-five dollars and Barker had ninety-seven dollars in cash in their possession. Tr. Oct. 22, 1996, at 479, 481.)

**The Contradictions Between Barker And Mark Lilly**

Mark Lilly's statements to police were contradicted by Barker on several points, particularly with respect to Mark Lilly's own culpability, how the murder allegedly occurred and what Petitioner allegedly said following the murder.

First, Mark Lilly *initially* told police that when their car broke down "*we* went across the parking lot and dude [Petitioner] pulled a gun on this other dude [DeFilippis] and told him we was taking his car and he was going with us," JA 253 (emphasis added), but *later* placed himself in their own car during the carjacking. JA 304-05. Barker, however, testified that he and Mark Lilly were walking towards the woods with the guns and liquor to "stash them in the woods . . . or to steal us a car and get out of there." JA 118-20.

Second, Mark Lilly told police that "nobody talked" following the hijacking, including the victim, JA 309-10,

while Barker testified that the victim told them that he would have been willing to give them a ride and take them wherever they wanted. JA 123.

Third, Mark Lilly said that he was in the car when the shooting occurred, and that only Petitioner and DeFilippis had gotten out of the car, JA 258-59, 312, but Barker testified that all four had gotten out. JA 123-25. Barker added that as he and Mark Lilly exited the car, they first told DeFilippis to close his eyes and then they got out of the car while DeFilippis had his eyes closed. JA 123. Mark Lilly, insisting that he did not exit the car, never mentioned this.

Fourth, while Mark Lilly denied having a weapon in the car, JA 255, Barker testified that in the car with DeFilippis, *Mark Lilly was carrying the pistol*, the murder weapon, in his pants. JA 124.

Fifth, Barker testified that *Mark Lilly* ordered DeFilippis to start walking away from the car, and that Petitioner asked Mark Lilly for the pistol which Mark Lilly was carrying before shooting DeFilippis, JA 127, 129, events which Mark Lilly completely omits.

Sixth, Mark Lilly stated that Petitioner shot DeFilippis from about "ten to fifteen yards" away, JA 259-60, whereas Barker testified that Lilly shot him at point-blank range. JA 195.

Seventh, Mark Lilly stated *initially* that nothing was said when Petitioner returned to the car after the shooting, JA 260-61, 316-17 but *later* asserted only that he and Barker said, "Goddamn. Motherfucker shot him," and affirmed the officer's suggestion that Petitioner responded, "I shot the dude and I think he's dead." JA 319-20. Barker testified, however, that he and Mark Lilly asked Petitioner why he had done it and that Petitioner had responded that DeFilippis had seen his face and he did not want to return to the penitentiary. JA 129-30.

Eighth, while Mark Lilly said Barker and Petitioner wanted to rob the first convenience store, JA 263, Barker testified that they had *all* agreed to rob the store to obtain money and leave town. JA 134.



Finally, while Mark Lilly said that Petitioner stole the money from the first convenience store, JA 266, Barker testified that it was *Mark Lilly* who rifled through the cash register. JA 136.

The material inconsistencies between Barker's testimony and Mark Lilly's statements to police underscore the extent to which Mark Lilly sought to minimize his own culpability and further undercut the reliability of Mark Lilly's statements.

**Mark Lilly's Recantation**

At Petitioner's post-sentencing hearing, Mark Lilly recanted his statements to police, testifying that he had lied to the authorities. Specifically, he testified that he had robbed DeFilippis, and that he was vomiting near the other side of the car during the murder and therefore could not say who committed the murder. JA 397-98, 399. He explained that when "[t]he investigator started talking all these life sentences . . . I could get . . . I got scared . . . [and] [threw] it off on somebody else." JA 397. He further explained that he blamed the murder on Ben Lilly, and not Barker, because he feared what Barker – his roommate – might say about him: "Well, me and Gary, we, we've been, we've been in a whole lot of trouble together and Gary knows a whole a lot on me. . . ." JA 400.

## ARGUMENT

**Admission Of Mark Lilly's Post-Arrest Statements Violated Petitioner's Sixth Amendment Right To Confrontation Because A Post-Arrest Statement, Made By A Non-Testifying Accomplice In The Course Of Custodial Interrogation, Which Shifts Blame To The Defendant And Incriminates The Defendant In Significantly More Serious Criminal Conduct, Is Inherently Unreliable And Therefore Inadmissible.**

Petitioner's conviction rests squarely on the uncross-examined hearsay statements of Mark Lilly. The admission of such statements of a non-testifying accomplice, without the

opportunity for confrontation and cross-examination, strikes at the core of the Confrontation Clause, and permits the precise evil the Clause was intended to cure: convictions based on the testimony of unknown and unchallengeable witnesses against the accused. The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." U.S. Const. amend. VI. As this Court has observed, " '[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (citation omitted).

The right to confront and cross-examine adverse witnesses "contribut[es] to the establishment of a system of criminal justice in which the perception . . . of fairness prevails," and "ensur[es] that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Lee*, 476 U.S. at 540. Indeed, as this Court has concluded:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys "would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, *confessions of accomplices*, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face. . . . "



*California v. Green*, 399 U.S. 149, 156-57 (1970) (citation omitted) (emphasis added). By eliminating this abusive practice, the right to confront and to cross-examine witnesses also "promotes reliability in criminal trials." *Lee*, 476 U.S. at 540.

As this Court has counseled, confrontation and cross-examination advance the pursuit of truth by

> (1) insur[ing] that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forc[ing] the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permit[ting] the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility.

*Id.* (quoting *California v. Green*, 399 U.S. at 158); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

Neither the perception of fairness nor the reliability of criminal trials is promoted when a blame-shifting custodial confession of a non-testifying accomplice is admitted against a defendant: that "witness," whose motivation to inculpate the defendant is inevitably suspect, is not subject to oath and cross-examination; as a result, he is wholly unknown to the jury and his testimony is unchallengeable by the defendant. For these reasons, admission of a non-testifying accomplice's blame-shifting custodial confession as substantive evidence against a criminal defendant implicates the core protection of the Confrontation Clause.

Mark Lilly's statements to police fall far short of meeting this Court's requirements under the Confrontation Clause for admission of hearsay statements which incriminate a criminal defendant. In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), this Court established "a general approach" for determining when statements incriminating a defendant and falling within an exception to the hearsay rule are admissible under the Confrontation Clause, an approach this Court reiterated more recently in *Idaho v. Wright*:

> "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' *Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.*"

497 U.S. 805, 814-15 (1990) (quoting *Roberts*, 448 U.S. at 65-66) (emphasis added).

Under that general approach, admission of Mark Lilly's statements violated the Confrontation Clause. First, although Mark Lilly was technically unavailable at trial because of his assertions of his Fifth Amendment rights, the timing of his trial was within the Commonwealth's control. If it had wanted Mark Lilly's trial testimony, it would have sought to try him before Petitioner or resolved his charges, as it did with Barker. Instead, the Commonwealth wanted to have its cake and eat it too: to use Mark Lilly's statements at Petitioner's trial, without exposing Mark Lilly to confrontation and cross-examination, and to preserve the option of trying him for capital murder.

Moreover, Mark Lilly's statements to police incriminating Petitioner lack any indicia of reliability. Those statements



are patently unreliable: they were not self-inculpatory of Mark Lilly; they were made in a context and under circumstances that belie any guarantees of trustworthiness, and cry out for adversarial testing to establish their reliability. Mark Lilly's statements neither fall within a firmly rooted hearsay exception nor possess particularized guarantees of trustworthiness. Accordingly, their admission into evidence violated Petitioner's constitutional right to confrontation under the Sixth Amendment.

### A. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Is Presumptively Unreliable And Inadmissible.

Under well-established caselaw, uncross-examined hearsay statements like Mark Lilly's, which are part of a custodial confession by an accomplice that incriminates a defendant, are presumptively unreliable and inadmissible under Confrontation Clause analysis. This Court has repeatedly

> recognize[d] that th[e] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. . . . [S]uch a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are *less credible than ordinary hearsay evidence.*"

*Lee*, 476 U.S. at 541 (citation omitted) (emphasis added); *see Williamson v. United States*, 512 U.S. 594, 601 (1994); *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973) ("confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest"); *Bruton*

*v. United States*, 391 U.S. 123, 136 (1968); *see also Williamson*, 512 U.S. at 607-08 (Ginsburg, J., concurring in part and in the judgment); *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring in result) (stating that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption").

Indeed, the presumption that the custodial statements of a codefendant or accomplice implicating a defendant are unreliable is so strong that this Court has never countenanced their admission. *See Lee*, 476 U.S. at 544-45; *Bruton*, 391 U.S. at 135-36; *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). *See also New Mexico v. Earnest*, 477 U.S. 648, 649-50 (1986) (Rehnquist, J., concurring) (describing presumption as "weighty"). For example, in *Douglas*, this Court reversed a conviction where the prosecutor read to the jury a confession made by the defendant's accomplice during nominal examination of the accomplice. Because the accomplice invoked his Fifth Amendment privilege when called to testify, the Court held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Douglas*, 380 U.S. at 419. "This [unanimous] holding," the Court has explained, "was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee*, 476 U.S. at 541.

Similarly, in *Bruton*, this Court reaffirmed its concern with the grave distortion to the truthfinding process resulting from admission of an accomplice's confession implicating a criminal defendant. The Court held that admission of a codefendant's confession at a joint trial violated the defendant's rights under the Confrontation Clause, notwithstanding the trial judge's instruction to the jury that the confession was admissible only against the codefendant. The Court concluded



that because a confession that incriminates the defendant is so "devastating" and "inevitably suspect," the risk that the jury would not follow instructions was too great to be ignored, underscoring that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." *Bruton*, 391 U.S. at 135-36.

To the same effect, in *Lee*, this Court stressed "the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." 476 U.S. at 546. The Court began its analysis by rejecting the "categorization of the hearsay involved in this case as a simple 'declaration against penal interest.'" *Id.* at 544 n.5. As the Court explained, "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* The Court then determined that the presumption of unreliability – that the codefendant's confession could not be trusted as to the defendant's participation in the murders – had not been rebutted. Specifically, the Court acknowledged the "reality of the criminal process . . . that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices," and concluded that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 544-45.[8]

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[8] Even the dissent in *Lee* recognized that "accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant." *Lee*, 476 U.S. at 552 (Blackmun, J., dissenting). The dissent noted that while it is "against one's penal interest to confess to criminal complicity," one's penal interest can nonetheless "be advanced greatly by ascribing the bulk of the blame to

That same view was reiterated by the Court in *Williamson* in the context of Rule 804(b)(3) of the Federal Rules of Evidence. In *Williamson*, the defendant was convicted based in part on the confession of an accomplice. That confession was broadly self-inculpatory, but also shifted blame to Williamson. Although the Court was divided over the precise proper interpretation of Rule 804(b)(3), it remanded for further consideration the admission of the non-self-inculpatory portions of the accomplice's statements as declarations against penal interest, using a rationale which applies with equal force to Confrontation Clause analysis.

As Justice O'Connor explained, writing for the Court:

> The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest . . . should be treated any differently from other hearsay statements that are generally excluded.

*Williamson*, 512 U.S. at 600 (citation omitted).[9]

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one's confederates." *Id.* The *Lee* dissent underscored that "[i]t is in circumstances raising the latter possibility – *circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest* – that we have viewed the accomplice's statements as 'inevitably suspect.' " *Id.* at 552-53 (emphasis added). Those circumstances, according to the dissent, were presented "starkly" in *Douglas*: "Only one shot had been fired, and it obviously was in the accomplice's penal interest to convince the authorities that he was not the one who fired it. *By 'fingering' the defendant, he minimized his own culpability.*" *Id.* at 553 (emphasis added).

[9] Prior to *Williamson*, the Supreme Court of Michigan similarly concluded that "*Lee* envisioned a careful and searching analysis of each specific factual assertion contained within any broader statement or confession." *People v. Watkins*, 475 N.W.2d 727, 737 (Mich. 1991). The



The Court therefore held that collateral statements, particularly those that implicate a third party, may not be presumed to be reliable:

> The district court may not just assume . . . that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else. "The arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, *a codefendant's statements about what*

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court noted that *Lee* underscored the unreliability of those particular statements by a codefendant concerning a defendant:

> The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is *presumptively unreliable as to the passages detailing the defendant's conduct or culpability* because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

*Id.* (emphasis added).

Accordingly, the *Watkins* court rejected the assumption underlying the "carry over rule" – that "discrete self-serving or neutral assertions within a broader statement somehow absorb an aura of trustworthiness from separate assertions which are against the declarant's interest. . . . " *Id.* The court therefore addressed the separate and severable statements in the confession, and concluded that neither those statements solely implicating a defendant nor those implicating both an accomplice and a defendant were admissible as declarations against interest under the Confrontation Clause. *Id.* at 738, 746-47. *See* 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 804.06[4][d], at 804-55 (Joseph M. McLaughlin ed., 2d ed. 1998) ("[W]hether a declarant is in custody or not, a statement which shifts a greater share of the blame to another person (self-serving) or which simply adds the name of a partner in crime (neutral) should be excluded even when closely connected to a statement that assigns criminality to the declarant.").

*the defendant said or did are less credible than ordinary hearsay evidence.*"

*Id.* at 601 (quoting *Lee*, 476 U.S. at 541) (emphasis added).[10]

Instead, the Court instructed that statements collateral to self-inculpatory statements must be viewed in context – in light of the surrounding circumstances – to determine whether they are themselves self-inculpatory and therefore admissible. *Id.* at 603-04. Indeed, although the *Williamson* Court was divided over the proper scope of Rule 804(b)(3), there was unanimous agreement that a blame-shifting custodial confession of an accomplice does not bear sufficient reliability for admissibility. *See* 512 U.S. at 600-01 (O'Connor, J.); *id.* at 607 (Scalia, J., concurring); *id.* at 607-08 (Ginsburg, J., concurring); *id.* at 618, 620 (Kennedy, J., dissenting).

In light of the disposition of the case under Rule 804(b)(3), the Court did not address the claim that the statements were inadmissible under the Confrontation Clause, and in particular did not decide whether the hearsay exception for declarations against interest is firmly rooted. However, as Justice O'Connor explained in a portion of the opinion joined by Justice Scalia, "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Id.* at 605 (citing *Lee*, 476 U.S. at 543-45,. If a blame-shifting custodial confession is

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[10] That same point was made by Justice Ginsburg in her concurring opinion:

> [T]he Court recognizes the untrustworthiness of statements implicating another person. A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation. For this reason, hearsay accounts of a suspect's statements implicating another person have been held inadmissible under the Confrontation Clause.

*Williamson*, 512 U.S. at 607-08 (Ginsburg, J., concurring) (citations omitted).



insufficiently reliable to qualify under a hearsay exception, it must also fail as an exception to the strictures of the Confrontation Clause.

Thus, this Court has consistently concluded that the statements of an accomplice or codefendant which are made during custodial interrogation and which incriminate a criminal defendant are inherently unreliable and therefore inadmissible under the Confrontation Clause. This time-honored principle is amply reflected in the decisions of the lower courts. Most federal appeals courts and state courts of last resort addressing the issue have properly concluded that custodial statements by an accomplice incriminating a criminal defendant are inadmissible under the Confrontation Clause.[11]

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[11] *See Crespin v. New Mexico*, 144 F.3d 641, 648-49 (10th Cir. 1998) (no reason to depart "from the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable" where declarant "may reasonably have thought such a statement would decrease her practical exposure to criminal liability"), *cert. denied*, ___ U.S. ___, 119 S.Ct. 378 (1998); *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993) ("[T]here is a[ ] category of statements against penal interest that should generally be regarded as inadmissible under the Confrontation Clause . . . , namely statements accusatory of another taken by law enforcement personnel with a view to prosecution."); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (statements were not sufficiently against interest where they were made while in custody, constituted an attempt to curry favor from authorities and trivialized declarant's role by shifting blame to defendant); *Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (admission of statement by codefendant incriminating defendant violated Sixth Amendment where made in response to custodial interrogation); *United States v. Cochman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (admission of accomplice's confession implicating defendant violated Confrontation Clause); *Olson v. Green*, 668 F.2d 421, 427-28 (8th Cir. 1982) (noting inherent unreliability of custodial statements implicating a third person, and concluding that statements of accomplice to police did not bear sufficient indicia of reliability); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (written confession made while in custody "may thus have been motivated in part by the prospect of severe punishment for his crime if he did not cooperate and the desire to

Only a few cases have permitted admission of a statement made while in custody and in response to police interrogation, but none involved a statement like the one at issue in this case: a custodial confession which consistently minimized the declarant's role and shifted blame to others, and in so doing avoided exposing the declarant to a death sentence.[12] In fact,

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gain favor with the Government in the hope of obtaining release or reduced punishment"). *See also Franqui v. State*, 699 So. 2d 1312, 1316, 1319 (Fla. 1997) (circumstances surrounding accomplice's confession admitting his role in robbery but inculpating defendant in shooting were insufficient to overcome presumption of unreliability), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1582 (1998); *Williams v. State*, 667 So. 2d 15, 20-21 (Miss. 1996) (noting "post-arrest statements made by one accused pointing the finger at another are as a matter of common experience among the least trustworthy of statements," and finding statement which "completely inculpated the defendant" inadmissible), *Watkins*, 475 N.W.2d at 742 (admission of codefendants' confessions incriminating defendants violated right of confrontation); *State v. Boyd*, 570 A.2d 1125, 1128-29 (Conn. 1990) (declining to extend rule allowing admission of trustworthy third party statements *exculpating* defendant to include those *inculpating* defendant); *cf. State v. Standifur*, 526 A.2d 955, 963 (Md. 1987) (statement made in custody implicating defendant was not sufficiently reliable to be admissible as declaration against interest).

[12] *See United States v. Keltner*, 147 F.3d 662, 670 (8th Cir.) (statement "clearly subjected" declarant to criminal liability for "activity in which [he] participated and was planning to participate with . . . both defendants"), *cert. denied*, 1998 U.S. LEXIS 7828 (1998); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996) ("entire statement inculpated both [defendant] and [declarant] equally" and "neither [attempted] to shift blame to his co-conspirators nor to curry favor from the police or prosecutor"); *see also Brown v. State*, 953 P.2d 1170, 1179-80 (Wyo. 1998) (affirming trial court's admission of only those portions of accomplice's statements that implicated him equally with defendant and noting that trial court had excluded portion of statement identifying defendant as trigger man); *State v. Hallum*, 585 N.W.2d 249, 258 (Iowa 1998) (affirming admission of parts of codefendant's confession implicating codefendant and defendant equally, but finding constitutional violation as to parts of confession implicating defendant alone); *State v. Gilliam*, 635 N.E.2d 1242, 1246 (Ohio 1994) ("Moore's statement did not attempt to exonerate



the vast majority of cases allowing admission of a declaration against interest which inculpated a defendant have not involved statements to known police officers.[13]

Moreover, courts have been particularly reluctant to admit into evidence such uncross-examined hearsay against a criminal defendant when, as here, "the declarant's unavailability is due simply to invocation of the Fifth Amendment in response to actual or potential prosecution." *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993). As the Sixth Circuit has explained,

> [A] rule allowing the government to replace the live testimony of key witnesses with prior grand jury or other extra-judicial statements creates a powerful incentive for prosecutors to acquiesce in, or even plan, the unavailability of witnesses in order to prevent live confrontation and cross-examination of witnesses in the courtroom. It is much easier to plan a trial and convince a jury of a contested set of facts if the jury hears only the direct testimony from one side. It is also more likely that witnesses will exaggerate, omit crucial facts or falsify if they know

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Moore and shift the blame to another co-defendant."); *State v. Nielsen*, 853 P.2d 256, 263-64, 269-70 (Or. 1993) (statement "admitted [declarant's] equally culpable involvement, rather than trying to shift blame"); *State v. Earnest*, 744 P.2d 539, 540 (N.M. 1987) (accomplice stated defendant shot victim in the head but first admitted trying to cut victim's throat at a time when the wounds to the throat were thought to have been cause of death and therefore exposed himself to possible death sentence).

[13] *See, e.g., Latine v. Mann*, 25 F.3d 1162, 1167 (2d Cir. 1994); *State v. Wilson*, 918 P.2d 826, 837 & n.11 (Or. 1996). The advisory committee's note to Federal Rule of Evidence 804(b)(3), recognizing this distinction, states:

> [A] statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. . . . On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying.

> their story will not be subject to cross-examination. We must hold to the ancient faith of the common law, incorporated by the founders in the Bill of Rights, that live confrontation and cross-examination of witnesses in the courtroom is the key to finding the truth in a criminal trial – a norm of judicial behavior that will be disregarded only for the most compelling reasons.

*United States v. Gomez-Lemos*, 939 F.2d 326, 333-34 (6th Cir. 1991).[14] That observation fits the Commonwealth's tactics here like a glove.

Thus, for all the foregoing reasons, Mark Lilly's blame-shifting custodial confessions were inherently unreliable.

### B. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Does Not Fall Within A Firmly Rooted Exception To The Hearsay Rule.

Although this Court has not formally reached – or needed to reach – the issue whether the *general* category of declarations against penal interest is a firmly rooted hearsay exception, instead describing it as "too large a class for meaningful Confrontation Clause analysis," *Lee*, 476 U.S. at 544 n.5,[15]

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[14] Such circumstances are presented, for example, when the "defendant has somehow procured the unavailability of the witness who refuses to testify." *Gomez-Lemos*, 939 F.2d at 334 n.3.

[15] The general exception for statements against penal interest, being of extremely recent vintage, is quite unlike other common law hearsay exceptions which have been deemed firmly rooted. *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (exception for co-conspirator statements accepted by Supreme Court over century and a half ago); *White v. Illinois*, 502 U.S. 346, 356 n.8 (1992) (exception for spontaneous declarations at least two centuries old). Indeed, while the common law admitted statements against pecuniary or proprietary interest, it did not recognize statements against penal interest as a hearsay exception. As one treatise stated more than twenty years ago, "[i]t is today commonly said, and has been expressly laid down by many judges, that the interest prejudiced by the facts stated must be either a pecuniary or a proprietary interest, and not a penal interest." 5 John Henry Wigmore, *Evidence* § 1476, at 349 (James H. Chadbourne ed., rev. vol. 1974). The Advisory Committee Note to the proposed 1972 Federal Rules of Evidence observed that the common law refused "to concede the adequacy of a penal interest." Fed. R. Evid. 804(b)(3) Advisory Committee Note. *See* Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Geo. L.J. 851, 859 (1981) ("[t]he common law courts were skeptical of the penal interest exception, using it to admit hearsay in only a few, dramatic instances[,]" and American courts followed the common law rule). It was not until the last few decades that the declaration against interest exception generally has been expanded to include declarations against penal interest. Even then, however, "the situation principally examined was whether a confession or other statement by a third person offered by the defense to *exculpate* the accused should be admissible." 2 Kenneth S. Brown et al., *McCormick on Evidence* § 318, at 341 (John William Strong ed., 4th ed. 1992). Therefore, prior to the adoption of the Federal Rule permitting declarations against penal interest in 1975, the possibility that statements against penal interest by third parties inculpating both the declarant and the defendant "was raised infrequently in cases or the literature." *Id.* at 342.

From a historical perspective, the Fifth Circuit in *Flores* doubted that the exception for statements against penal interest fairly could be deemed firmly rooted. 985 F.2d at 776 n.13. The court therefore concluded that "[t]he relatively recent recognition of declarations against penal interest as an exception to the hearsay rule by the Federal Rules of Evidence would seem to counsel against a headlong rush to broadly embrace the exception as providing a sufficient substitute for cross-examination and personal confrontation. . . . " *Id.* at 779. Several states have reached the same conclusion with respect to their own penal interest exceptions. *See Simmons v. State*, 636 A.2d 463, 468-69 (Md. 1994); *Franqui*, 699 So. 2d at 1319; *People v. Newton*, 966 P.2d 563, 574 n.13 (Colo. 1998); *State v. Mason*, 460 S.E.2d 36, 46 (W.V. 1995) (question "resolved implicitly").



> there can be no legitimate question that this Court and others have uniformly deemed the *subcategory* of custodial statements by an accomplice or codefendant which implicate a criminal defendant to be presumptively unreliable under the Confrontation Clause. Accordingly, whatever may be said of

the *general* category of statements against interest, statements within the *subcategory* cannot be said to fall within a firmly rooted hearsay exception. *See Lee*, 476 U.S. at 543-45 & n.5; *Chambers*, 410 U.S. at 299-300 (noting the view that "confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest").[16]

Four federal appeals courts, expressly following this Court's teachings regarding the inherent unreliability of custodial confessions, have properly held that the exception for declarations against interest cannot be deemed firmly rooted as applied to custodial statements by an accomplice which inculpate a defendant. *Earnest v. Dorsey*, 87 F.3d 1123, 1131 (10th Cir. 1996); *Flores*, 985 F.2d at 776 n.13; *Morrison v. Duckworth*, 929 F.2d 1180, 1181 n.2 (7th Cir. 1991) (state hearsay exception); *Olson v. Green*, 668 F.2d 421, 427-28 & nn.10, 11 (8th Cir. 1982) ("United States Supreme Court decisions, as well as decisions from the courts of appeals, indicate that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception."). As the Tenth Circuit recently concluded:

> Generally, evidence is presumptively reliable if it comes within a firmly rooted hearsay exception. [The codefendant's custodial] statement . . . cannot be immunized by the exception for statements against interest. Although it is a statement against penal interest . . . , the Supreme Court has held that

[16] Since statements falling within a firmly rooted hearsay exception are deemed *presumptively reliable*, *Roberts*, 448 U.S. at 66 (firmly rooted "hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection' ") (citation omitted); *White*, 502 U.S. at 355 & n.8 ("firmly rooted" hearsay exceptions carry sufficient indicia of reliability to satisfy the Confrontation Clause because such statements "are made in contexts that provide substantial guarantees of their trustworthiness"), statements which are *presumptively unreliable* cannot fall within a firmly rooted hearsay exception.



> in this context that hearsay exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee v. Illinois*, 476 U.S. 530, 544 n.5, 106 S. Ct. 2056, 2064 n.5, 90 L. Ed. 2d 514 (1986). Moreover, custodial confessions "have traditionally been viewed with special suspicion." *Id.* at 541, 106 S. Ct. at 2062. Therefore, [the codefendant's] statement was "presumptively unreliable," *id.*, and was admissible against [the defendant] only if the state demonstrated "particularized guarantees of trustworthiness." *Id.* at 543, 106 S. Ct. at 2063.

*Dorsey*, 87 F.3d at 1131.[17]

[17] Two state supreme courts have concluded that a declaration against interest that inculpates a defendant is not within a firmly rooted hearsay exception. *Newton*, 966 P.2d at 574 n.13; *State v. Parris*, 654 P.2d 77, 81 (Wash. 1982); *see* 2 Brown et al., *supra*, *McCormick on Evidence* § 319, at 347. Seven other states, moreover, expressly exclude a statement or confession made by a codefendant or accomplice implicating both himself and the accused from their exception for declarations against interest. *See* Ark. R. Evid. 804(b)(3); Ind. R. Evid. 804(b)(3); Me. R. Evid. 804(b)(3); Nev. Rev. Stat. § 51.345(2); N.J. R. Evid. 63(10); N.D. R. Evid. 804(b)(3); Vt. R. Evid. 804(b)(3). *But see* Ohio R. Evid. 804(B)(3).

The few state supreme courts addressing the narrow issue whether a custodial confession inculpating a defendant falls within a firmly rooted hearsay exception have reached a similar conclusion. *See State v. Hughes*, 510 N.W.2d 33, 38 (Neb. 1993) ("Although the hearsay exception for statements against penal interests encompasses statements that may be inherently reliable, the exception also encompasses statements that are inherently unreliable. Particularly, statements made while the declarant is in police custody and in which the declarant implicates another party are highly suspect and presumptively unreliable. . . . It cannot be said, without a specific showing of trustworthiness, that such a statement should be admitted without the opportunity for cross-examination.") (citing *Lee*); *Watkins*, 475 N.W.2d at 741 ("*Lee* did thereby reject the possibility that an accusatory hearsay statement in a codefendant confession, purportedly constituting a statement against interest, might on that ground be deemed presumptively admissible without any inquiry into its particularized guarantees of trustworthiness."); *Mason*, 460 S.E.2d at 46 ("[A]bsent a showing of particularized guarantees of trustworthiness, the admission of a

Although five federal appeals courts have suggested that the exception for the general category of declarations against penal interest is firmly rooted, these decisions provide no basis, reasoned or otherwise, for departing from the principle that the general category is too large a class for meaningful constitutional analysis where the statement at issue is a custodial confession by an accomplice. Only one of those cases involved a statement by an accomplice made in the course of custodial interrogation, and that case utterly failed to address this principle. *See United States v. Keltner*, 147 F.3d 662, 671 (8th Cir. 1998). The remaining decisions are all readily distinguishable from the case at bar: three addressed statements to family or friends (*United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir. 1991) (finding federal exception firmly rooted in case involving statements made to two associates); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (concluding, based on *United States v. Katsougrakis*, 715 F.2d 769 (2d Cir. 1983), that the exception "would seem to be 'firmly rooted' " in case involving statements made to declarant's girlfriend and stepfather); *Katsougrakis*, 715 F.2d at 776 (statements to friend));[18] while the fourth concerned a non-custodial interview with a Secret Service agent, *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991). Unlike custodial confessions, these are not the sorts of statements that this Court has deemed inherently unreliable.[19]

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third-party confession implicating a defendant violates the Confrontation Clause.") (internal quotation marks omitted). *See also State v. Abourezk*, 359 N.W.2d 137, 139-41 (S.D. 1984) (finding *Olson v. Green*, 668 F.2d 421 (8th Cir. 1982), which holds that custodial confessions implicating a third party are not firmly rooted, to be controlling).

[18] *Katsougrakis* was decided prior to this Court's decision in *Lee*, and its continuing viability has been questioned. *See, e.g., United States v. Matthews*, 20 F.3d 538, 545 (2d Cir. 1994); *United States v. Bakhtiar*, 994 F.2d 970, 978 (2d Cir. 1993).

[19] Other than the Virginia Supreme Court, the only state court of last resort holding, in the context of a custodial confession, that the exception for declarations against interest is firmly rooted effectively ignored this



Accordingly, a custodial confession incriminating a criminal defendant may be admitted only if, and only to the extent that, it bears particularized guarantees of trustworthiness. *See Lee*, 476 U.S. at 543-45; *Williamson*, 512 U.S. at 605 ("[T]he very fact that a statement is *genuinely* self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause.") (citing *Lee*, 476 U.S. at 543-45) (emphasis added).

### C. Mark Lilly's Custodial Confessions Incriminating Petitioner Do Not Bear Particularized Guarantees Of Trustworthiness.

Mark Lilly's custodial statements were inadmissible unless their reliability was supported by "particularized guarantees of trustworthiness." *See Wright*, 497 U.S. at 815. As this Court has made clear, only the circumstances surrounding

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Court's decision in *Lee*. That court barely paid lip service to the presumption of unreliability and inadmissibility that this Court has consistently held attaches to custodial confessions implicating a criminal defendant, concluding that the statement at issue "was not as inherently suspect as the typical co-defendant's confession referred to in [*Lee*]. Moore's statement did not attempt to exonerate Moore and shift the blame to another codefendant." *Gilliam*, 635 N.E.2d at 1246. Not only is the court's conclusion that the declaration did not attempt to shift blame questionable, *id.* at 1248 (Wright, J., dissenting), but the court's reliance on *Lee* is also misplaced. In *Lee*, the precise question the Court asked was "whether the confession was . . . free from *any desire, motive or impulse* [by the codefendant] . . . to mitigate the appearance of his own culpability by spreading the blame or to overstate [the defendant's] involvement." *Lee*, 476 U.S. at 544 (emphasis added). *Lee* was not principally concerned with whether the codefendant actually attempted to exonerate himself, but with the fact that a codefendant in custody has a recognized motive to do so, which makes "a codefendant's confession . . . presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages *may well be* the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 545 (emphasis added).

the making of the statements are relevant to that determination. Despite this Court's clear prohibition on the use of corroborating extrinsic evidence to establish particularized guarantees of trustworthiness, the Virginia Supreme Court expressly ignored the circumstances surrounding the making of his statement and instead considered other allegedly corroborating extrinsic evidence presented at trial. There is no reason to depart from this Court's conclusion that the relevant inquiry for determining the trustworthiness of a custodial confession that incriminates a criminal defendant is limited exclusively to the guarantees of trustworthiness that existed when the statement was made. Here, those circumstances make clear that Mark Lilly's statements were not truly self-inculpatory, and therefore belie any guarantees of trustworthiness and, in fact, confirm their inherent unreliability.

### 1. Only The Circumstances Surrounding The Making Of The Hearsay Statements Are Relevant In Assessing Their Guarantees Of Trustworthiness.

Contrary to the contention of the Commonwealth, Cert. Opp. 28, this Court's holding in *Wright* – that only the circumstances surrounding the making of the statement are relevant to assessing its trustworthiness, without reference to other evidence at trial – applies equally to the determination whether a declaration against penal interest inculpating a defendant bears the requisite guarantees of trustworthiness. A contrary rule would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, and require a showing of prejudice to establish a denial of the right to confrontation, results that are at odds with the requirements of the Sixth Amendment.

In *Wright*, a case involving the hearsay statements of a three-year-old victim of child abuse under a state's residual hearsay exception, this Court held that the particularized guarantees of trustworthiness of a statement which does not fall within a firmly rooted hearsay exception include only



those circumstances that "surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 819. This Court premised its holding on the rationale for permitting exceptions to the hearsay rule. As the Court explained, the various hearsay exceptions are founded on circumstantial guarantees of trustworthiness "that existed at the time the statement was made and do not include those that may be added by using hindsight." *Id.* at 820. If the declarant's truthfulness is so clear from the surrounding circumstances that cross-examination would be of marginal utility, the hearsay rule poses no bar to admission. *Id.* "Because evidence possessing particularized guarantees of trustworthiness must be at least as reliable as evidence admitted under a firmly rooted hearsay exception," this Court concluded that "evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821 (citation and internal quotation marks omitted). This Court therefore prohibited consideration of corroborating evidence because it

> would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with th[is] requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

*Id.* at 823. Accordingly, this Court held that "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

This Court's rationale for limiting the trustworthiness inquiry to the circumstances surrounding the making of the statements applies with equal, if not greater, force in the context of accomplice confessions that incriminate a criminal

defendant.[20] Such a confession, like the child victim's statements in *Wright*, "do[es] not fall within a firmly rooted hearsay exception," and is therefore "presumptively unreliable and inadmissible for Confrontation Clause purposes." *See id.* at 818 (citing *Lee*). Moreover, the unavailable declarant's truthfulness is not "so clear from the surrounding circumstances that the test of cross-examination would be of

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[20] Corroborative evidence is an especially inappropriate factor in the context of custodial confessions because the police, by "co-authoring" a confession, can build references to such evidence into the statement. *See* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogation*, 6 B.U. Pub. Int. L.J. 719, 745 (1997) (corroboration does not satisfy the requirement of trustworthiness of a statement, especially where "the police are co-authors of the confession . . . who can incorporate into the confessions information known only to themselves and to the real perpetrator . . . and thereby, in effect, corroborate the confession") (citations omitted); Gisli Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony* 259 (1992) ("it is clear . . . that innocent suspects do sometimes give information to the police that, on the face of it, seems to have originated from the accused, whereas the information was probably unwittingly communicated to them by the police in the first place," and such apparently "guilty knowledge," which often makes the confession look credible, is then used to substantiate the validity of the confession given). *Cf.* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 604 (1992) ("Limiting evidence to the truthfulness of the declarant rather than the truth of the statement in question. . . . makes perfect sense . . . in terms of restraining the prosecution. The result is that prosecutors cannot bolster weak evidence that would be insufficient to support a verdict by leaning on a witness to produce a statement that a court would then find sufficiently trustworthy to satisfy the Confrontation Clause because it is corroborated by the original evidence. Such an opportunity to bootstrap . . . would give the prosecution an incentive to prop up unsubstantial evidence with hearsay statements obtained through inquisitorial questioning. The majority's opinion [in *Wright*], though couched in terms of reliability and trustworthiness, restrains a prosecutor from attempting to shape the evidence during an interview controlled by an interrogator who induces a statement from a declarant who will be conveniently absent at trial.").



marginal utility." *Id.* at 820. Indeed, like the child's statements in *Wright*, an accomplice confession incriminating a criminal defendant stands in stark contrast to the types of hearsay statements as to which cross-examination would be of marginal utility.[21] Accordingly, here, as in *Wright*, "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." *Id.* at 821.

Correctly recognizing that *Wright* is not limited to a child's hearsay allegations of sexual abuse, six federal appeals courts and numerous state courts of last resort have held that under the Confrontation Clause, the trustworthiness of a declaration against penal interest of an accomplice incriminating a criminal defendant must be evaluated independently of any other evidence introduced at trial, and solely on the basis of the circumstances surrounding the making of the statement. *See United States v. Moses*, 148 F.3d 277, 281 (3d Cir.), *petition for cert. filed* (Oct. 7, 1998) (No. 98-6403); *Crespin v. New Mexico*, 144 F.3d 641, 648 (10th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 378 (1998); *United States v. Barone*, 114 F.3d 1284, 1300 (1st Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 614 (1997); *United States v. Matthews*, 20 F.3d

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[21] The basis for admitting dying declarations, excited utterances, or statements made for the purposes of medical diagnosis or treatment – all of which have been found to constitute firmly rooted hearsay exceptions, *Pointer*, 380 U.S. at 407; *White*, 502 U.S. at 743 n.8 – is that "such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation," and that "persons making such statements are highly unlikely to lie." *Wright*, 497 U.S. at 820. An accomplice confession incriminating a criminal defendant, by contrast, is not only considered less reliable than ordinary hearsay, *Lee*, 476 U.S. at 541, but is deemed presumptively unreliable and inadmissible for Confrontation Clause purposes, because of the inherent motive "to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 544-45.

5.8, 545 (2d Cir. 1994); *Flores*, 985 F.2d at 775; *United States v. Harty*, 930 F.2d 1257, 1264 (7th Cir. 1991); *see also People v. Newton*, 966 P.2d 563, 574 (Colo. 1998); *State v. Hallum*, 585 N.W.2d 249, 257 (Iowa 1998); *Franqui v. State*, 699 So. 2d 1312, 1318 (Fla. 1997); *Williams v. State*, 667 So. 2d 15, 21 (Miss. 1996); *State v. Mason*, 460 S.E.2d 36, 46 (W.Va. 1995); *Simmons v. State*, 636 A.2d 463, 470 (Md. 1994); *State v. Hughes*, 510 N.W.2d 33, 39 (Neb. 1993); *State v. Nielsen*, 853 P.2d 256, 267 (Or. 1993); *State v. Cook*, 610 A.2d 800, 804-05 (N.H. 1992); *People v. Watkins*, 475 N.W.2d 727, 745-46 (Mich. 1991); *State v. Whelchel*, 801 P.2d 948, 957 (Wash. 1990).

None of the few courts that look to extrinsic corroborating evidence in determining whether the accomplice confession at issue bears particularized guarantees of trustworthiness, including the Virginia Supreme Court, provides any reasoned basis for not applying *Wright* in the context of declarations against penal interest. In fact, like the Virginia Supreme Court, 499 S.E.2d at 533-34, the Eighth Circuit did not even mention *Wright* in its analysis, concluding instead that declarations against interest constitute a firmly rooted hearsay exception. *Keltner*, 147 F.3d at 671. Other courts, while relying on extrinsic corroborative evidence, actually purported to follow this Court's decision in *Wright*. *See Gilliam*, 635 N.E.2d at 1246 (citing *Wright* but confusedly concluding that statement against interest was admissible under the Confrontation Clause because it met requirements of exception – statement tended to subject declarant to criminal liability and there were sufficient corroborating circumstances – and it was admissible pursuant to a firmly rooted hearsay exception and there were particularized guarantees of trustworthiness surrounding statement); *id.* at 1247 (Wright, J., dissenting) ("Ironically, the majority cites the very page of the opinion in [*Wright*] which repudiates its position."); *Brown v. State*, 953 P.2d 1170, 1180 (Wyo. 1998) (citing *Wright* while finding requisite guarantees



of trustworthiness in part because statements were "substantially corroborated").

Moreover, consideration of extrinsic corroborative evidence to determine the admissibility of the custodial blame-shifting statement of an accomplice would impermissibly threaten to convert the admissibility issue into a trial on the merits,[22] effectively making the determination of whether a constitutional violation has occurred turn on whether any error in allowing the statement to be admitted was harmless. This Court has concluded, however, that "the focus of the Confrontation Clause is on the individual witnesses," and not "on the outcome of the entire trial," for "[i]t would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). Accordingly, admission of a blame-shifting custodial statement by a non-testifying accomplice which incriminates a defendant must turn on the particular "witness" and the circumstances surrounding the making of his statement, and not on other corroborative evidence presented at trial.

Thus, under the Confrontation Clause, the admissibility of Mark Lilly's statements to police incriminating Petitioner turns solely on the circumstances surrounding their making.

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[22] *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1022 (1998) ("The reliability determination threatens to become a shadow of the trial on the merits – a battle over the ultimate factual issues at stake in the prosecution, based on all the evidence presented at trial. To prevent this from happening, the court must crop the inquiry. One way is to exclude from it information that might substantially help prove the accuracy of the particular statement not because it tells us anything about the making of the statement but only because it points in the same direction as the statement.").

### 2. The Circumstances Surrounding The Making Of Mark Lilly's Statements Incriminating Petitioner Confirm That Those Statements Are Unreliable And Hence Inadmissible.

Here, the circumstances surrounding the making of Mark Lilly's statements implicating Petitioner completely undermine their reliability. There is nothing in those circumstances that provides any basis for rebutting the presumption of unreliability. *See Wright*, 479 U.S. at 881. In fact, Mark Lilly's statements suffer from every indicia of unreliability that prevents admission of a custodial confession implicating another. Indeed, such statements, when viewed in their full context, cannot be considered truly self-inculpatory, and should never be admitted without the opportunity for cross-examination.

Mark Lilly made his statements after having been arrested and held in custody for several hours, and his statements were not spontaneous, but instead were made in response to police interrogation by several officers over the course of more than an hour. This Court and lower courts have consistently recognized that such circumstances render statements incriminating a defendant unreliable.[23]

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[23] *See Dutton*, 400 U.S. at 87, 88-89; *Chambers*, 410 U.S. at 300; *United States v. Costa*, 31 F.3d 1073, 1079 (11th Cir. 1994); *Fuson*, 773 F.2d at 61; *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981); *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979); *Whelchel*, 801 P.2d at 955-56.

The significance of custodial interrogation and its effects on suspects must not be underestimated. A growing body of scholarship studying the psychological effects of interrogation techniques suggests that the assumption underlying such techniques – that an innocent person would not confess – does not hold true. As Gisli Gudjonsson, a clinical psychologist and former police interrogator, has concluded, "The view that apparently normal individuals would never seriously incriminate themselves when interrogated by the police is totally wrong, and this should be recognized by the judiciary." Gudjonsson, *The Psychology of*



Mark Lilly's "unsworn statement[s] w[ere] [also] given in response to questions of police" *after* they had questioned Barker and "no doubt knew what they were looking for," a circumstance which further indicates that the statements could not be trusted as to Petitioner's participation in the crimes. *Lee*, 476 U.S. at 544; *Watkins*, 475 N.W.2d at 746; *Hughes*, 510 N.W.2d at 818; *see also Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985). Because the officers clearly knew what they were looking for, they used a question and answer format in conducting their interrogation. Mark Lilly's statements, therefore, "consist of detailed, specific questions and specific answers; none involves any kind of unsolicited narrative." *Whelchel*, 801 P.2d at 955-56. The use of such suggestive or leading questions has been criticized as a form of deceptive interrogation which may yield false or unreliable confessions. Gisli Gudjonsson & Noel K. Clark, *Suggestibility in Police Interrogation*, 1 Soc. Behav. 83, 85 (1986); *see supra* n.20.

Furthermore, as this Court and others have concluded, having been arrested and subjected to interrogation regarding a number of robberies and a murder, Mark Lilly had a tremendous incentive to minimize his own role and to shift or spread

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*Interrogations*, *supra*, at 259, 323; George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 Tex. L. Rev. 231, 258-9 (1988); Johnson, *False Confessions*, *supra*, 6 B.U. Pub. Int. L.J. at 721; Richard J. Ofshe & Richard A. Leo, *Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 Denv. U. L. Rev. 979, 983 (1997); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 Crime, Law and Social Change 35, 37 (1992).

This scholarship likewise undermines the already tenuous rationale underlying the exception for declarations against penal interest – that an innocent person would not make a statement incriminating himself unless it were accurate. *See* Michael D. Bergeisen, Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Cal. L. Rev. 1189, 1210, 1217 (1978); Andrew R. Keller, Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159, 163 (1983).

blame, curry favor or divert attention to another, an incentive which renders his statements regarding what Petitioner said or did unreliable. *See Lee*, 476 U.S. at 545; *Williamson*, 512 U.S. at 604. *See also, e.g., Flores*, 985 F.2d at 782; *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981); *Watkins*, 475 N.W.2d at 743-44.[24]

Mark Lilly's statements to police bear out this incentive. As the Virginia Supreme Court itself recognized, Mark Lilly's statements were self-serving, shifting principal responsibility to others and offering claims of mitigating circumstances. Mark Lilly trivialized his role to the point that he suggested he was something of a bystander who happened to be present when the various crimes were committed. He shifted virtually all responsibility for criminal conduct onto Barker and Petitioner, essentially identifying Barker as responsible for the robberies and Ben Lilly as responsible for the carjacking and shooting. His statements implicating Petitioner are not self-inculpatory, and are not reliable. *See Lee*, 476 U.S. at 544-45 (record evidence documented reality that once "the jig is up,"

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[24] Commentators have likewise recognized the strong presumption of inadmissibility of declarations against interest inculpating an accused, particularly when made in police custody. *See* 5 Weinstein & Berger, *Weinstein's Federal Evidence*, *supra*, § 804.07[1], at 804-64 ("Because of the danger of prejudice involved, exclusion should almost always result when a statement against penal interest is offered *against* an accused."); 3 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* 1848-49 (7th ed. 1998) ("[I]t will be most unlikely for a postcustodial confession to be considered sufficiently disserving and reliable to qualify under either Rule 804(b)(3) or the Confrontation Clause when it directly implicates a nondeclarant. . . . "); Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 Wm. & Mary Bill Rts. J., 753, 764-65, 775-79 (1996) (accomplice's confession to police is unreliable per se); Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence* § 8.64, at 1398 (1995); Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. Rev. 1, 35-38 (1987).



partners in a crime "lose any identity of interest" and "immediately become antagonists"); *id.* at 553 (Blackmun, J., dissenting).[25]

To the extent, moreover, that Mark Lilly implicated himself in any crimes, he inculpated Petitioner in a significantly more serious crime, which further undermines the reliability of his statements incriminating Petitioner. *See United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981). Finally, Mark Lilly's reliance on his drunkenness to explain his lack of

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[25] *See also Crespin*, 144 F.3d at 647, 648; *United States v. Innamorati*, 996 F.2d 456, 475 (1st Cir. 1993) (finding inadmissible a co-defendant's statement that "admitted to a few acts of logistical assistance" while maintaining that "others were guilty of wrongdoing from which [the declarant] had been excluded but happened to have some knowledge"); *Flores*, 985 F.2d at 782 ("Taking on the full blame for a minor role in an offense . . . does little to demonstrate trustworthiness because the declarant still has the motive to shift the blame to others so as to receive a lesser penalty."); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (statements unreliable where they "trivialized [the declarant's] role in the drug conspiracy by pointing to Magana as the 'kingpin' "); *Sarmiento-Perez*, 633 F.2d at 1102 ("[The] declarant might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement[s] as a whole – including the ostensibly disserving portions – to be *in* his interest rather than against it."); *Love*, 592 F.2d at 1025-26 (a co-defendant's statement to police was inadmissible because the declarant, fearing prosecution for aiding and abetting, "may well have believed it was in her best interest to make a statement implicating [the defendant] as the instigator in order to ingratiate herself with the F.B.I. and divert attention to another"); *Simmons*, 636 A.2d at 471 (statement inadmissible where "Coley admitted only to playing a minor role – knocking on the door; he denied taking anything, and put the weapons used in the hands of other members of the gang"). *See also* 4 David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 489, at 1141 (1980) ("A statement conceding a minor role to declarant and attributing to another the major responsibility resembles more an attempt to foist blame on the other while minimizing declarant's responsibility, and thus the statement as a whole advances far more than it impairs the interests of the declarant. . . . ").

memory and his participation in the crimes likewise undermines the reliability of his statements incriminating Petitioner, *Crespin*, 144 F.3d at 648, as does the fact that Petitioner did not corroborate, or otherwise adopt, Mark Lilly's statements incriminating him, *Fuson*, 773 F.2d at 61 (statement lacked indicia of unreliability in part because "the petitioner [did not] corroborate [the codefendant's] statements with a subsequent confession"); *Latine v. Mann*, 25 F.3d 1162, 1166-67 (2d Cir. 1994) (a custodial confession incriminating a defendant is inadmissible against the defendant "unless other evidence demonstrates that the defendant adopted or authorized the statement").[26]

Thus, based on the circumstances surrounding the making of Mark Lilly's statements – the only indicia of reliability permitted under this Court's caselaw for determining the statements' trustworthiness[27] – those statements do not bear particularized guarantees of trustworthiness. Accordingly, since the presumption of unreliability has not been rebutted, admission of Mark Lilly's statements posed the very "danger against which the Confrontation Clause was erected – the

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[26] The Commonwealth mistakenly relies on the fact that "[t]he officers [interrogating Mark Lilly] . . . all were available at trial for cross-examination." Cert. Opp. 24. As this Court stated in *Douglas*, in words equally appropriate here,

> the opportunity to cross-examine the law enforcement officers [was not] adequate to redress this denial of the essential right secured by the Confrontation Clause. . . . [T]heir evidence tended to show only that [the accomplice] made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of [the accomplice] to test the truth of the statement itself.

380 U.S. at 419-20.

[27] Even if the extrinsic evidence were considered relevant to determining the trustworthiness of Mark Lilly's statements to police were considered, those statements would nonetheless be inadmissible because the extrinsic evidence contradicts – and does not corroborate – Mark Lilly's statements. *See supra* 16-18.



conviction of a defendant based . . . on presumptively unreliable evidence." *Lee*, 476 U.S. at 543. Admission of Mark Lilly's statements violated Petitioner's fundamental constitutional right to confront the witnesses against him, and "call[ed] into question the ultimate 'integrity of the fact-finding process' " underlying Petitioner's trial, conviction and death sentence. *See Chambers*, 410 U.S. at 295 (citation omitted); *Danner v. Kentucky*, No. 97-2057, 1998 WL 348372, at *2 (Nov. 16, 1998) (Scalia, J., dissenting from denial of *cert.*) (denial of right of confrontation "was such an obvious and blatant violation of the Sixth Amendment that it would warrant summary reversal").

## CONCLUSION

For all the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed and this matter remanded for a new trial.

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December 22, 1998

Respectfully submitted,

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## APPENDIX

## CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.